

THE HONORABLE THOMAS S. ZILLY

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON

BUNGIE, INC., a Delaware corporation,

Plaintiff

v.

AIMJUNKIES.COM, a business of unknown
classification; PHOENIX DIGITAL GROUP
LLC, an Arizona limited liability company;
JEFFREY CONWAY, an individual; DAVID
SCHAEFER, an individual; JORDAN GREEN,
an individual; and JAMES MAY, an individual,

Defendants.

Cause No. 2:21-cv-0811 TSZ

**DEFENDANTS' OPPOSITION
TO PLAINTIFF'S MOTION TO
DISMISS COUNTERCLAIMS**

**Note on Motion Calendar:
October 28, 2022**

Oral Argument Requested

(Redacted)

Defendants Phoenix Digital Group LLC ("Phoenix Digital") and James May ("Mr. May"), for the reasons stated herein, oppose Plaintiff Bungie, Inc.'s Motion to Dismiss their Counterclaims (Dkt#64).

I. INTRODUCTION

Faced with the increasingly undeniable fact that Bungie's case has no underlying merit, Bungie shifts to personal attacks on Defendants and their counsel.

Discovery has now established that Bungie, *itself*, claims under oath that it has never seen the source code for the subject "Destiny 2 Cheat Software," that it has never seen the object code for such software, that it has never "reverse engineered" such software and that is has never even performed *any* sort of analysis of such software.¹ Indeed, Bungie's corporate

¹ Bungie, through its Rule 30(b)(6) designated representative, Dr. Edward Kaiser, so testified at his October 5, 2022 deposition.

1 representative has now testified under oath that Bungie has done nothing more than simply
2 purchase a subscription to the subject software from Phoenix Digital and thereafter use the
3 software “for about ten minutes.” That, apparently, is the full extent of whatever “pre-filing
4 investigation” Bungie made before bringing this action.

5 Based on this ten minute use of the software, and its admission that it has never even
6 seen, much less analyzed the actual code for the subject software, Bungie brazenly asserts,
7 without explanation or identifiable basis, that the “cheat software” at issue here *must*
8 nevertheless somehow copy Bungie’s software. This is nothing more than mere speculation,
9 otherwise known as a guess.

10 In a blatant case of the pot calling the kettle black, Bungie nevertheless asserts in its
11 Motion to Dismiss that the subject counterclaims are based on “mere speculation,” (Dkt#64,
12 p.7). Bungie does this apparently oblivious to the fact that that is *precisely* what its own claim
13 of copyright infringement is based on. In reality, and as established herein, the subject
14 Counterclaims are based on far more than, “mere speculation,” and are founded in part on
15 records Bungie *itself* created that document when it accessed Defendants’ computers without
16 authorization on more than one-hundred occasions, as well as which computer files were
17 accessed.

18 Knowing its potential liability, and desperate to dismiss Defendants’ counterclaims,
19 Bungie resorts to blatant misrepresentations of fact and law. Desperate to prevent even an
20 opportunity for Defendants to amend their counterclaims should this Court conclude that
21 more detailed pleadings are needed, Bungie demands the extraordinary remedy of a dismissal
22 with prejudice. To support this, Bungie resorts to gratuitous attacks on Defendants and their
23 counsel. If Bungie truly believed Defendants and/or their counsel are in breach of any
24 applicable rule or law, adequate remedies are available, such as a formal motion for default or
25 a motion under Rule 11, following the procedures specified in both those rules and this
26 Court’s Local Rules. Bungie fails to do this, opting instead to engage in histrionics rather
27 than address the supposed transgressions using the procedures specified for so doing.
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II ARGUMENT

A. Mr. May's Counterclaims Plead Proper And Plausible Claims For Unauthorized Access And Theft Of Computer Data

1. Mr. May's Supporting Allegations Are All Based On Stated Facts

The gist of Mr. May's three counterclaims is that Bungie, without authorization, accessed Mr. May's personal computer and downloaded information contained thereon into Bungie's own files. Contrary to Bungie's assertions, these pleadings are not "bare bones," but, rather, are backed up by both pleaded facts and documentary evidence.

At paragraph 2 of his First Counterclaim, Mr. May expressly alleges that, "At all relevant times, [he] has maintained, used and operated at his home a personal computer on which personal, private and confidential information is stored and maintained in one or more files contained on his personal computer's hard drive." (Dkt#63, p.11, ¶2.) This is not a conclusory, bare bones statement bereft of facts, and neither is it a statement of law. Accepting the allegation as true, which this Court must do in considering a motion to dismiss, the statement clearly and directly establishes that Mr. May possesses private and confidential information and materials that he maintains on his own personal computer. Any fair reading of this allegation cannot properly conclude otherwise.

At paragraph 3 of his First Counterclaim, Mr. May expressly alleges that he, "protects access to the files on his personal computer by requiring the use of one or more passwords, known only to him, to gain access to the files on his personal computer's hard drive," and that he further, "includes a firewall on his computer to deter and prevent unauthorized access to his computer and the files and data contained thereon." (Dkt#63, p.11, ¶3.) Again, these are clear and direct statements of fact that establish not only that Mr. May maintains private and confidential information and materials on his computer, but that he restricts and prevents unauthorized access to such private and confidential information and materials through use of

1 “passwords” and “a firewall” to protect against unauthorized access. Again, any fair reading
2 of these allegations cannot properly conclude otherwise.

3 At paragraph 6 of his first counterclaim, Mr. May alleges that, “The LSLA in effect at
4 all relevant times does not provide Bungie, Inc. with authorization to surreptitiously access
5 files on [his] personal computer and/or download information from those files without the
6 direct knowledge and express authorization of Mr. May.” (Dkt#63, p.11, ¶6.) This states the
7 clear fact that the LSLA agreed to by Mr. May and effective as of the relevant dates simply
8 *does not* contain any authorization for Bungie to defeat the password and firewall protections
9 Mr. May has employed, and *does not* contain any authorization for Bungie to access the
10 private and confidential information and materials Mr. May maintains on his so-protected
11 personal computer. To the extent that Bungie now claims that such authorization is provided
12 in a separate document that does not actually appear in the LSLA but, rather, is merely
13 referenced in the LSLA, is itself a factual and legal argument that is properly addressed at a
14 later stage, and not at the stage of a Rule 12(b)(6) motion to dismiss. See, *Marquez v.*
15 *Rodriguez*, 3:18-cv-0434-CAB-NLS, 2021 WL 2826075 at *5 (S.D. Cal. July 6, 2021) (“As a
16 general rule, a district court may not consider any material beyond the pleadings in the ruling
17 on a Rule 12(b)(6) motion.”)

18 At paragraph 7 of his first counterclaim, Mr. May alleges that, “On several occasions
19 between October 2, 2019 and May 25, 2021 Bungie, Inc., without the knowledge and
20 authorization of Mr. May accessed and obtained information from personal files contained on
21 Mr. Mays’ personal computer,” (Dkt#63, p.11, ¶7), while at paragraph 8, Mr. May provides
22 detailed factual and documentary support for this allegation. (Dkt#63, p.12, ¶8.) In
23 particular, Mr. May includes as Exhibit B to his Answer and Counterclaim a document,
24 *produced by Bungie itself* that clearly shows and evidences Bungie’s accessing and viewing
25 confidential information and materials resident on his password and firewall protected
26 computer. *Id.*

1 As expressly alleged by Mr. May in his first counterclaim, “Exhibit B evidences some
2 one-hundred and four (104) instances in which Bungie, Inc., without the knowledge of, and
3 authorization by, Mr. May accessed Mr. May’s personal computer and downloaded
4 information from it.” *Id.* The “one-hundred and four” instances can be verified simply by
5 counting up the one-hundred four individual line items included on Exhibit B. As further
6 expressly alleged by Mr. May, “‘Column C’ of Exhibit B entitled ‘Evidence’ contains
7 multiple listings that identify computer files contained only on Mr. May’s computer.” As an
8 example of such listings “that identify computer files contained only on Mr. May’s
9 computer,” Mr. May, expressly alleges that the “listings” on the very document that Bungie
10 produced, “are expressly identified, for example, with the location, ‘c:\users\james\desktop\
11 reclass\blah64.exe (4D09FFB3B8CFE53A8250D1A112C4CDE3)’ which, in fact, is a private
12 file on the ‘c’ drive of Mr. May’s computer.” *Id.*

13 Mr. May specifically and expressly alleges that the location, “c:\users\james\desktop\
14 reclass\blah64.exe (4D09FFB3B8CFE53A8250D1A112C4CDE3)” is a private file on the “c”
15 drive of his personal computer, and it is beyond question that this location appears in
16 documentation created by, and produced to Defendants by, Bungie, itself. It is not “mere
17 speculation” that Bungie accessed these files, and while Bungie may feign ignorance of what
18 these locations are, Mr. May knows exactly what they are and clearly alleges, in Paragraph 8
19 of his counterclaims that they are, in fact, “private file[s] on the ‘c’ drive of [his] computer.”
20 (Dkt#63, p.12, ¶8.)

21 At Paragraph 11 of his counterclaim, Mr. May specifically and expressly alleges, that,
22 “Bungie, Inc.’s unauthorized access of Mr. May’s confidential and private computer files has
23 caused and will continue to cause Mr. May irreparable injury and damage.” (Dkt#63, p.12,
24 ¶11.)

25 In his second counterclaim, Mr. May specifically alleges further facts regarding the
26 measures he takes to protect against unauthorized access to his private and confidential
27 computer records.
28

1 At Paragraph 16 of his counterclaim, Mr. May specifically and expressly further
2 alleges, that he, “protects the files and data on his personal computer through such
3 technological means as the use of passwords and firewalls to preclude unauthorized access to
4 the data, files and records thereon,” (Dkt#63, p.13, ¶16), while at Paragraph 17 he specifically
5 and expressly alleges that, “Bungie, Inc.’s unauthorized infiltration of [his] personal computer
6 and its unauthorized surveillance and acquisition of the personal records contained therein has
7 caused and will continue to cause [him] irreparable injury and damage.” (Dkt#63, p.13, ¶17.)

8 In his third counterclaim, Mr. May, at paragraphs 22 and 23, specifically and expressly
9 further alleges that he, “protects the files and data on his personal computer through such
10 technological means as the use of passwords and firewalls to preclude unauthorized access to
11 the data, files and records thereon,” and that, “Bungie, Inc.’s unauthorized infiltration of [his]
12 personal computer and its unauthorized surveillance and acquisition of the personal records
13 contained therein has caused and will continue to cause [him] irreparable injury and damage.”
14 (Dkt#63, p.13, ¶¶22,23.)

15 In his fourth counterclaim, Mr. May, at paragraphs 28 and 29, specifically and
16 expressly further alleges that, “On information and belief, Bungie bypassed, removed,
17 deactivated, and/or impaired one or more of the technological measures Mr. May employed to
18 control access to his computer(s) and the files and data contained thereon without the
19 authority of Mr. May,” and that, “As a direct result of Bungie’s circumvention, Mr. May has
20 been injured, and will continue to be injured.” (Dkt#63, p.14, ¶¶28,29.)

21 These allegations are all supported by expressly stated facts and supporting
22 documentary evidence. Contrary to Bungie’s false claims, they are not bare bones, they are
23 not based on “mere speculation” or conjecture, and they are more than sufficient to set out
24 more than “plausible” claims for relief.
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2. Bungie's Arguments Are Without Merit

i There are more than ample facts pleaded to support a "plausible" claim that Bungie accessed Mr. May's computer

Bungie initially hopes to dismiss Mr. May's Counterclaims with the bald statement that, "May's allegations regarding Bungie's supposed 'access' of his computer are simply false." (Dkt 64, p.6.) If this were the standard, every case should and must be dismissed whenever a defendant says, "The allegations are false." But as Bungie *itself* has previously argued on many prior occasions (see, e.g., Dkt#30, p.4) "On a motion to dismiss under Rule 12(b)(6), a plaintiff need only allege facts sufficient to state a claim for relief that is plausible on its face. *Cook Prods., LLC v. Swanicke*, No. C16-1844 TSZ, 2017 WL 5665427, at *1 (W.D. Wash. Aug. 24, 2017) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 568 (2007)) and, "On a Rule 12(b)(6) motion, the court must accept the complaint's factual allegations as true and draw 'all reasonable inferences in favor of the nonmoving party.'" *Id.* (citing *Usher v. City of Los Angeles*, 828 F.2d 556, 561 (9th Cir. 1987)).

Bungie now blatantly ignores these clear standards that it, itself, asserted to this Court only a few months ago. And just as recently as August 18, 2022, this Court, in this very case, correctly noted that, "The Court must take as true uncontroverted allegations in the [Counterclaim] and must resolve any conflicts over statements in affidavits in the [Counterclaim] plaintiff's favor." Dkt# 61, p.2, citing, *Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797, 800 (9th Cir. 2004).

More importantly, Mr. May's allegations are anything but false.

First, they are undeniably based on information and documents, *Bungie itself* obtained, created and produced to Defendants in discovery. There can be no denying that "Exhibit B" (Dkt# 63-2) to Mr. May's Counterclaims is a document produced by Bungie and that contains information obtained from Mr. May's own personal computer.

Second, Mr. May himself, in his accompanying declaration, testifies not only that the files identified in Exhibit B are, in fact, personal and private files on his own computer, but

1 further testifies that certain of these files have nothing to do with “Destiny 2” and, in fact, are
 2 resident on remote memory storage devices connected to his computer. (May Declaration,
 3 ¶¶5,6,7-12.) This is more than sufficient to draw “a reasonable inference” that Bungie
 4 “accessed” Mr. May’s computer. At the very least, it is more than sufficient to create a
 5 factual question sufficient to preclude dismissal of Mr. May’s Counterclaims at this stage.

6 ***ii Mr. May suffered damages in excess of \$5000***

7 Mr. May in his Counterclaim clearly alleges that, “Bungie, Inc.’s unauthorized access
 8 of Mr. May’s confidential and private computer files has caused and will continue to cause
 9 Mr. May irreparable injury and damage.” Dkt#63, ¶¶11, 17, 23 &31. Although he did not
 10 specify a figure for such damages, Mr. May, in his accompanying declaration, specifies that
 11 his direct damages as a result of Bungie’s unauthorized access to his computer has resulted in
 12 direct damages in excess of \$5000. (May Declaration, ¶16.) These damages include, in part,
 13 the direct expense of purchasing a new computer to replace the one compromised by Bungie’s
 14 unauthorized access, as well as the tens of hours he spent reviewing his files for signs of
 15 compromise, “cleaning” such files found to be compromised, and then transferring those
 16 “cleaned” files to the new computer. *Id.* Mr. May further testifies that these expenses were
 17 incurred between May 28, 2022 and June 15, 2022, a period of less than 12 months. *Id.*
 18 Accordingly, even if this Court were to require Mr. May to file an amended Counterclaim,
 19 Mr. May has the facts to establish that his damages resulting directly from Bungie’s
 20 unauthorized access of his computer exceed \$5000 during a one-year period.

21 ***iii Bungie’s reliance on its LSLA and its “Privacy Policy” are misplaced***

22 In arguing that Bungie both had authority to access Mr. May’s computer and that it did
 23 not “exceed” that authority, Bungie claims that its “LSLA” and the “Privacy Policy”
 24 incorporated therein “authorized” Bungie to access the subject files on Mr. May’s computer.
 25 Bungie is wrong. Neither document provides any such authority.

26 The March 6, 2020 LSLA (Dkt#36-B) that governs here says absolutely nothing about
 27 granting Bungie access to Mr. May’s (or anyone else’s) personal computers. Indeed, Bungie
 28

1 makes no serious claim that it does. Instead, Bungie relies on a “Privacy Policy” (Dkt#66-1)
2 that is incorporated by reference into the LSLA. In his accompanying declaration, Mr. May
3 testifies that he never gave Bungie authorization to access his personal files, and neither the
4 Bungie LSLA or the Privacy Policy told him Bungie would. (May Declaration, ¶13.) The
5 problem for Bungie is that the Privacy Policy it relies on does not authorize Bungie to do what
6 it did either. Bungie intentionally hopes to mislead the Court on that.

7 The Privacy Policy sets out in black and white exactly what information Bungie says it
8 will obtain from users of its services. This is spelled out in Section 2 entitled, “Information
9 We Collect,” subsection “(a)” entitled, “Information Provided by You.” Section 2(a) of
10 Bungie’s Privacy Policy sets out the information it will collect from users, (i.e., “You”) as
11 follows: “Contact Data,” “Credentials,” “Demographic Data,” “Billing Data,” “Profile Data,”
12 “Content,” and “Resume Data.”

13 Each of these categories is further defined in the Privacy Policy, and *none* of the
14 categories as so defined includes personal and confidential files contained on the hard drive
15 and/or external drives of the Bungie users.

16 Section 2(a) of the Privacy Policy further states that Bungie collects this information
17 “from you at various points through the Bungie Services,” and expressly lists the various
18 points at which this can occur. These are expressly listed as, “Registration,” “Purchases,”
19 “Subscriptions and Promotions,” “Community Interaction,” “Customer Service,” “Business
20 Partners,” and “Job Application.” None of these categories on its face includes accessing
21 personal and confidential files on a user’s computer, and none of the further definitions of
22 these categories in the Privacy Policy includes any such access either.

23 Section 2(b) of the Bungie Privacy Policy further sets out what information Bungie
24 will collect “automatically” from its users. These are expressly listed as follows: “Cookies,”
25 “Pixels,” and “App Technologies.” Neither these titles nor the definitions that follow them in
26 the Privacy Policy remotely include accessing personal and confidential files on a user’s
27 computer.
28

1 Section 2(a) of the Bungie Privacy Policy then goes on to list, “The categories of
 2 information we automatically collect and have automatically collected in the last 12 months”
 3 as follows: “Bungie Services Use Data,” “Device Data,” and “Location Data.” The Privacy
 4 Policy further states that “Bungie Services Use Data,” includes, “information about your use
 5 of the Bungie Services, the pages and content that you view, the referring and exiting pages,
 6 your access times, the links you click, and other actions taken within the Bungie Services.” It
 7 further states that, “Device Data,” includes, “information regarding your device, such as
 8 device type, operating system type, browser type, device regional and language settings, IP
 9 address, and device ID (such as IDFA or AAID).” It finally states that, “Location Data,”
 10 includes, “imprecise location (location based on your IP address or data that indicates a city or
 11 postal level).” Importantly, *none* of these definitions or categories includes accessing
 12 personal and confidential files on a user’s computer. Such is neither “Service Use Data,”
 13 “Device Data,” or “Location Data,” whether as understood by the public in general or as
 14 defined in the Privacy Policy itself.

15 These are the *only* categories of data Bungie’s own Privacy Policy permits Bungie to
 16 collect from its users, and *none* of these categories permits Bungie to surreptitiously access
 17 the private, confidential files maintained on a user’s personal computer. The Privacy Policy
 18 simply does not permit Bungie to do what it did, and Bungie’s reliance on it is misguided, if
 19 not downright disingenuous. At best, it reflects an inability to construe clear contract
 20 language.

21 Bungie argues that its surveillance of Mr. May’s computer was authorized by the
 22 language of the Privacy Policy relating to, “enforcing [Bungie’s] Terms of Use [and its] legal
 23 rights,” and to “prevent or address potential or actual injury or interference with [Bungie’s]
 24 rights, property, operations, users or others who may be harmed or may suffer loss or
 25 damage.” (Bungie Opposition Brief, Dkt#64, at p.9). This too is disingenuous.

26 A simple inspection of the Privacy Policy clearly shows that this language appears
 27 only in Section 3 of the Privacy Policy, entitled “Use of Information.” Section 3 of the
 28

1 Privacy Policy specifies in plain language what *use* Bungie may make of, “your Personal
 2 Information,” but does not *redefine* what that “Personal Information” is. “Personal
 3 Information,” in turn, is expressly defined in Section 2 of the Privacy Policy and, as
 4 established above, *does not* include the personal and confidential files maintained on a user’s
 5 computer.

6 Bungie’s blatant attempt to ignore what its own Privacy Policy actually says in favor
 7 or what it does not say is misguided and ignores not only the most basic canons of contract
 8 interpretation but the English language itself. The Privacy Policy Bungie relies on simply
 9 does not permit Bungie to do what it did to Mr. May.

10 ***iv. Mr. May pleads a proper Anti-Circumvention claim***

11 Bungie’s arguments that Mr. May fails properly to plead a claim for circumvention of
 12 technological measures are misplaced.

13 Mr. May clearly alleges at Paragraphs 3, 16 and 22 of his Counterclaims (Dkt#63) that
 14 he uses technological measures, such as “one or more passwords,” and “a firewall,” to protect
 15 the private and confidential files on his computer. The case law is clear that passwords and
 16 firewalls do, indeed, comprise “technological measures” for purposes of 17 U.S.C. § 1201(a)
 17 (1)(A). See, e.g., *Synopsys, Inc. v. InnoGrit, Corp.*, No. 19-CV-02082-LHK, 2019 WL
 18 4848387, at *12 (N.D. Cal. Oct. 1, 2019) (“Courts that have examined similar password or
 19 encrypted control code systems in the past have roundly concluded that these systems are
 20 indeed “technological measures” for the purposes of the DMCA.”) See, also, *Ticketmaster*
 21 *L.L.C. v. Prestige Entm’t W., Inc.*, 315 F. Supp. 3d 1147 (C.D. Cal. 2018) (Holding that use of
 22 “CAPTCHAS” to control access to website is use of a “technological measure” for purposes
 23 of DMCA).

24 Furthermore, it is well-established that computer records are themselves
 25 copyrightable. See, *Ticketmaster L.L.C. v. Prestige Entm’t W., Inc.*, *supra*. (“These pages and
 26 data are dynamic non-literal content and literal content, respectively, both of which, as
 27 discussed above, are protected by Ticketmaster’s copyrights.”) 315 F. Supp. 3D at 1167.

1 There is no credible basis for Bungie's claim that the computer files on Mr. May's computer
2 are not works protected by copyright. On the contrary, they are. (May Declaration, ¶3.)

3 Finally, there can be no legitimate dispute that Mr. May alleges circumvention of the
4 technological measures, namely passwords and firewalls, Mr. May uses and relies on to
5 protect his confidential computer records and files. (See, Paragraphs 6, 8, 9 and 28 of his
6 Counterclaims, Dkt#63.) Not only does Mr. May allege such circumvention, Exhibit B to his
7 counterclaim along with his accompanying declaration provide more than ample evidence that
8 Bungie not only accessed Mr. May's files, but kept a detailed record of when it did so and
9 what files were accessed. (See also, May Declaration, ¶¶5-12, 14, 15 and Exhibit A attached
10 thereto.)

11 **B. Phoenix Digital's Counterclaims Plead Proper And Plausible Claims For Breach**
12 **of Contract and Circumvention of Technological Measures Under 17 U.S.C. §**
13 **1201(a))**

14 **1. Phoenix Digital's Supporting Allegations Are All Based On Stated Facts**
15 **Or Identifiable Information and Reasonable Belief**

16 At Paragraphs 33-42 of its First Counterclaim (Dkt#63, pp.14-15, ¶¶33-42), Phoenix
17 Digital clearly and expressly alleges the numerous facts upon which its claim for breach of
18 contract is based. These include the existence of a "Terms of Service" agreement that
19 customers of Bungie's products and services must agree to (Dkt#63, pp.14, ¶33), and
20 prohibitions in the Terms of Service against "decompil[ing], reverse engineer[ing] or
21 otherwise inspect[ing] the internal workings of the software. These also include restrictions
22 specifying that customers, "shall not modify, hack, decompile, disassemble, reverse engineer,
23 derive source code, or create derivative works of our software, in part or in whole," and that
24 they "shall not transmit our software or display the software's object code on any computer
25 screen or to make any hard copy memory dumps of the software's object code." (Dkt#63,
26 pp.15, ¶37.)

1 In addition, Paragraphs 38 and 39 of Phoenix Digital's first counterclaim expressly
 2 allege that "Bungie, Inc., on or about January 3, 2020 obtained access to the "cheat software"
 3 at issue here," and that it did so using the alias, "Martin Zeniu" to do so. (Dkt#63, pp.15,
 4 ¶¶38, 39.) At the Rule 30(b)(6) deposition of Bungie, Inc., conducted on October 5, 2022,
 5 Bungie's corporate representative, Dr. Edward Kaiser, confirmed that Bungie, Inc., did indeed
 6 purchase a subscription to the "cheat software" at issue here on January 3, 2020 and did so
 7 using the alias, "Martin Zeniu." Not only does Bungie use an alias and fake address to
 8 disguise and hide its acquisition of the "cheat software" from Phoenix Digital, it did so using
 9 the services of PayPal, apparently in disregard for PayPal's own publicly stated policy against
 10 the use of false or fictitious names in using its services.

11 At Paragraph 40 of its first counterclaim, Phoenix Digital expressly alleges that,
 12 "Upon information and belief, Bungie, Inc., decompiled, reverse engineered and otherwise
 13 inspected the internal workings of the 'cheat software' product obtained from the aimjunkies
 14 website by 'Martin Zeniu' on or about January 3, 2020, in breach of the Phoenix Digital
 15 Terms of Service to which Bungie, Inc., had agreed." (Dkt#63, pp.15, ¶40.)

16 The "information and belief" upon which this allegation is based includes, in part, the
 17 Declaration of Edward Kaiser (Dkt#36) previously filed by Bungie in this action wherein Dr.
 18 Kaiser directly and expressly testifies, under oath, that, "I am familiar with the cheat software
 19 sold by Defendants," (Dkt#36, ¶10), that, "Bungie obtained a copy of the Cheat Software" *id.*,
 20 and that, "The team analyzed it to understand its features." *Id.*

21 Further evidence on which Phoenix Digital bases the "information and belief" that
 22 Bungie reverse engineered or otherwise violated the Phoenix Digital Terms of Service is
 23 provided at ¶11 of Dr. Kaiser's Declaration wherein he testifies that, "In order to show the
 24 cheat users the location of players in Destiny 2, the Cheat Software needs to (a) ascertain the
 25 location of other players and (b) display the relevant information to the cheat user," and that,
 26 "Both of these actions require copying and modifying Bungie's software code in Destiny 2."
 27 (Dkt#36, ¶11.)
 28

1 Still further evidence on which Phoenix Digital bases the “information and belief” that
2 Bungie reverse engineered or otherwise violated the Phoenix Digital Terms of Service is
3 provided at ¶14 of Dr. Kaiser’s Declaration wherein he testifies that, “To enable the Cheat
4 Software’s ESP feature, the Defendants needed to copy the data structures associated with
5 player positioning in Destiny 2 to ascertain the location of other characters, and reverse
6 engineer the software code for Destiny 2’s rendering functions to modify what is displayed,”
7 and that, “Defendants then had to incorporate cheat software derived from copied Destiny 2
8 code into every copy of the Cheat Software that they sold or distributed.” (Dkt#36, ¶14.)

9 Still further evidence on which Phoenix Digital bases the “information and belief” that
10 Bungie reverse engineered or otherwise violated the Phoenix Digital Terms of Service is
11 provided at ¶15 of Dr. Kaiser’s Declaration wherein he testifies that, “In order for the Cheat
12 Software features to work while playing Destiny 2, the Cheat Software injects into (i.e., runs
13 its software code inside) the Destiny 2 engine,” and that, “The injected code extracts
14 information to which the cheat user does not ordinarily have access from the player
15 positioning data structures and then manipulates the rendering data structures and calls the
16 camera and display functions...” (Dkt#36, ¶15.)

17 Still further examples of where Bungie’s own Engineering Lead, Dr. Kaiser, purports
18 to have detailed knowledge of the inner workings of the “cheat software” at issue here are
19 presented in Paragraphs 16-20 of Dr. Kaiser’s Declaration, Dkt#36 upon which Bungie based
20 its motion for preliminary injunction (Dkt#35) and upon which this Court relied in granting
21 that injunction (Dkt#50).

22 For Bungie to claim now that it never did a detailed analysis of the subject “Cheat
23 Software,” that it did not reverse engineer it, decompile it, or otherwise engage in any of the
24 activities proscribed by Phoenix Digital’s Terms of Service is either disingenuous in the
25 extreme or provides ample grounds for this Court to withdraw and vacate the preliminary
26 injunction as having been granted in reliance on facts presented by Bungie that Bungie, itself,
27 apparently now says are false.
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Phoenix Digital's Second Counterclaim further specifically alleges at Paragraphs 44 and 45 that, "On information and belief, Bungie bypassed, removed, deactivated, and/or impaired one or more of the technological measures Phoenix Digital employed to control access to its proprietary programs it uses to distribute the "cheat software" at issue here," and that, "Bungie, without the authorization of Phoenix Digital, improperly gained access to loader software used by Phoenix Digital to distribute the 'cheat software' at issue here to its customers." (Dkt#63, p.16, ¶¶44-45.)

2. Bungie's Arguments Are Without Merit

Bungie makes the claim that Phoenix Digital fails to allege that its Terms of Service "applied when Bungie purportedly downloaded the Cheat Software of that Bungie agreed to them." Bungie goes on to claim that, "Phoenix Digital's failure to plead such basic facts is fatal, and likely incurable." Nonsense.

At Paragraph 33 of its first Counterclaim (Dkt#63, ¶33), Phoenix Digital clearly alleges that, "In order to gain access to the 'cheat software' products at issue here, subscribers to any of the products offered by Phoenix Digital through the "Aimjunkies" website must agree to the Terms of Service required by Phoenix Digital." This language is not restricted as to time, and a fair reading states clearly that agreeing to the Terms of Service is a *requirement* of gaining access to the "cheat software" regardless of when it occurs. Bungie's intentional failure to understand this clear language amounts, at best, to raising debater's points and is hardly an adequate basis for dismissing a Counterclaim, either with or without prejudice.

Furthermore, Bungie's argument at footnote 9 of its opposition claiming that its own "captures" of the Aimjunkies website indicate the "current link...was added sometime after Bungie filed its lawsuit," is a factual allegation that should and must be addressed other than in a Rule 12(b)(6) motion, wherein factual allegations in a Counterclaim are to be regarded as true.

1 Finally, and although redundant, Phoenix Digital, through the accompanying
2 Declaration of its Officer and Director, David Schaefer, confirms that, yes indeed, the Terms
3 of Service attached as Exhibit C to the Counterclaims (Dkt# 63-3) were in effect well before
4 this action was filed and were in effect on January 3, 2020 when Bungie downloaded the
5 subject “cheat software” from the Aimjunkies website using a fake name and fake address to
6 do so. (Schaefer Declaration, ¶12.) Should this Court order that an amended Counterclaim be
7 filed, Phoenix Digital has ample facts available to do so.


8 Similarly, Bungie’s claim that Phoenix Digital has failed to plead harm and damages
9 is misplaced. As also established by the accompanying Declaration of David Schaefer,
10 Phoenix Digital created and developed proprietary software to enable subscribers to its
11 services to “load” certain “cheat software” into their computers. This proprietary software,
12 referred to herein as the “cheat loader,” is protected under the Copyright laws as a work of
13 original authorship owned by Phoenix Digital.





14 As further established by the Declaration of Mr. Schaefer, Phoenix Digital actively
15 took steps to prevent unauthorized access to its proprietary “cheat loader.” (Schaefer
16 Declaration, ¶14.) These steps included the use of a commercially available tool called
17 Themida to protect the loader against reverse engineering. *Id.* The Themida tool obfuscates
18 and protects the software code so that the process of reverse engineering is extremely slowed
19 or entirely stopped. *Id.* The Themida tool employs Themida’s proprietary SecureEngine
20 technology to add anti-cracking techniques to the executable, adding protection to prevent
21 analysis and modification of the protected software. *Id.* There is, in fact, ample factual
22 support for Phoenix Digital’s allegation that its proprietary and copyrighted loader software is
23 protected by technological measure to prevent unauthorized access to its internal workings.

24 Bungie’s claim that Phoenix Digital has not “identif[ied] an act of ‘circumvention’”
25 allegedly committed by Bungie is equally flawed. At paragraph 40 of Phoenix Digital’s first
26 counterclaim, Phoenix Digital expressly alleges that, “Upon information and belief, Bungie,
27 Inc., decompiled, reverse engineered and otherwise inspected the internal workings of the
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1 “cheat software” product obtained from the aimjunkies website by “Martin Zeniu” on or about
 2 January 3, 2020, in breach of the Phoenix Digital Terms of Service to which Bungie, Inc., had
 3 agreed.” (Dkt#63, ¶40.) Phoenix Digital’s “information and belief” are well-founded.

4 As discussed in detail at Section B 1 above, this “information and belief” is not “mere
 5 speculation” or “conjecture,” but, rather, is based on the claims made by Bungie itself. These
 6 include not only the various allegations made by Bungie in its first amended complaint
 7 purporting to establish that the “cheat software” at issue here “copies” Bungie’s claimed
 8 software, but also includes the detailed declaration of Dr. Kaiser Bungie filed in this case
 9 wherein he purports to have knowledge of the inner workings of the “cheat software.” If Dr.
 10 Kaiser does have knowledge of the inner workings of the “cheat software,” he reasonably
 11 obtained it through decompiling or reverse engineering it in breach of Phoenix Digital’s
 12 Terms of Service. If he does *not* have knowledge of the inner workings of the “cheat
 13 software,” this simply confirms what Defendants have been saying all along, namely that
 14 Bungie does not, and cannot have evidence of “copying,” and that this entire action is a sham
 15 lawsuit brought in bad faith to “demonstrate that Bungie will not tolerate cheating in Destiny
 16 2,” and to shut down the entirely legal activities of Phoenix Digital and the individual
 17 defendants.

18 Furthermore, at least one “Highly Confidential” document produced by Bungie in this
 19 matter² confirms that Bungie conducted a detailed examination of the “Aimjunkies Cheat
 20 loader,” which, as established by the accompanying Declaration of David Scafer, is a
 21 proprietary and protected program created and owned by Phoenix Digital. This two-page,
 22 single-spaced document clearly shows that 

23 
 24 
 25 
 26  This is a more than

27 2 See accompanying Declaration of Philip P. Mann and Exhibit A thereto.
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adequate basis to form a plausible and reasonable belief that Bungie, in fact, analyzed and reverse engineered the Phoenix Digital cheat loader, in breach of the applicable Terms of Service.

Finally, and as further established by the Declaration of David Schaefer, Phoenix Digital suffered damages and harm as a result of Bungie's breach of the Terms of Service. In particular, Phoenix Digital, upon forming the reasonable, (and now confirmed) belief that Bungie was impermissibly analyzing and reverse engineering its cheat loader, was forced to re-design and re-write the loader, all at considerable effort and expense to Phoenix Digital. (Schaefer Declaration, ¶6.) In addition, as a result of this baseless and unfounded lawsuit Bungie has filed, which is based largely on a supposed investigation Bungie made of the cheat loader in breach of the Terms of Service, and as a result of the widespread, adverse publicity directed toward Phoenix Digital, the value of the aimjunkies.com website has been adversely affected, and Phoenix Digital was only able to sell the website at a greatly reduced price compared to what it was worth had this baseless lawsuit not been filed. (Schaefer Declaration, ¶7.)

C. The Counterclaims Cannot Properly Be Dismissed With Prejudice

1. There Are Ample Facts To Support The Counterclaims

There are ample facts, consisting in part of documents and testimony provided by Bungie and/or its employees themselves, to support the Counterclaims. The accompanying Declaration of Defendant James May is more than adequate to set out a "plausible" claim that Bungie, without authorization, accessed not only files on the hard drive of his computer, but on remote drives connected to that computer as well. Contrary to Bungie's unsupported claims, Mr. May, who is actually familiar with the various files located in the more than one-hundred file path locations listed on the very document that Bungie *itself* produced in discovery (Dkt#63-2), testifies clearly in his accompanying declaration that these are, in fact, his own private files containing personal and confidential information that, in many cases, have *nothing* to do with Bungie or Destiny 2. Furthermore, in his declaration, Mr. May

1 establishes that he incurred more than \$5000 in expenses and effort to correct the harms
2 caused by Bungie's unauthorized access to his computer.

3 Although Mr. May believes his Counterclaims as written set out facts that are more
4 than adequate to make a "plausible" claim, should this Court believe otherwise, Mr. May
5 should, and must, be accorded an opportunity to amend his pleadings to set out whatever
6 additional information is needed. It is well-settled law that motions to dismiss at the pleading
7 stage are disfavored, and that leave to amend should and must be granted freely. See *Tigard*
8 *Electric, Inc. v. National Electrical Contractors Ass'n*, 790 F. Supp. 1498, 1502 (D. Or. 1992)
9 ("Because the court rules before it receives any evidence, motions to dismiss are
10 disfavored."); Rule 15(a)(2) Fed.R.Civ.P. ("The court should freely give leave [to amend]
11 when justice so requires.")

12 Similarly, Phoenix Digital's Counterclaims, which, too, are based on facts *already*
13 pleaded under oath by Bungie itself and confirmed by Bungie's own documents, set out more
14 than sufficient facts to support a plausible claim against Bungie. Again, it is Bungie's own
15 allegations, both in its amended complaint and in the Declaration of Dr. Kaiser it has
16 previously submitted, that provide more than ample basis for Phoenix Digital to have the
17 "information and belief" that it alleges. Again, should this Court believe that further
18 information is needed, Phoenix Digital should and must be accorded an opportunity to amend
19 its pleadings.

20 In short, the Counterclaims are hardly the sort of claims that simply cannot be proved
21 no matter how many attempts to amend them are made. See, *McGary v. City of Portland*, 386
22 F.3d 1259, 1261 (9th Cir. 2004) ("Dismissal of the complaint is appropriate only if it appears
23 beyond doubt that the plaintiff can prove no set of facts in support of the claim which would
24 entitle him to relief."); *Hicks v. Skaar*, No. C20-5100 RJB, at *4 (W.D. Wash. Oct. 15, 2020)
25 ("On a 12(b)(6) motion, 'a district court should grant leave to amend even if no request to
26 amend the pleading was made, unless it determines that the pleading could not possibly be
27 cured by the allegation of other facts.'"). As established by the accompanying declarations,
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1 more than sufficient facts are available, should they be needed, to supplement the pleadings
2 and “fill in” whatever holes might exist, if any.

3 **2. Bungie’s Procedural Arguments Are A Red Herring**

4 Bereft of factual and legal grounds to support its motion to dismiss, Bungie instead
5 attacks Defendants and their counsel on manufactured procedural grounds.

6 To the extent Bungie claims or suggests that Defendants are in default as a result of
7 the timing of their Answer and Counterclaims, the law in this District regarding default is
8 clear and set out in Local Rule LCR 55, which sets out in detail the procedure to be followed
9 in moving for default and that expressly provides that at least fourteen days notice be given
10 where, as here, the opposing party has appeared and is represented by counsel (LCR 55(a)).
11 Bungie did not follow this procedure, and the email Bungie sent asking when Defendants
12 would be filing their responsive pleading is, fairly read, either a genuine inquiry or a
13 “reminder” that the pleading is due. To the extent Bungie supposes this somehow satisfies the
14 requirements of LCR 55(a), which expressly requires that Bungie give “written notice of [its]
15 intention to move for the entry of default,” it does not. No such intention is anywhere stated
16 in Bungie’s email. Either the email was intended to ask a genuine question, or it was part of
17 some calculated scheme to provide Bungie with ammunition for a later attack. Either way,
18 Defendants are not in default, given Bungie’s failure to follow the procedures expressly set
19 out in LCR 55.

20 Similarly, Bungie’s not-so-veiled threat at footnote 2 of its motion to seek “sanctions
21 under Fed.R.Civ.P. 11(c),” is another example of Bungie’s passive-aggressive posturing. The
22 procedures under Rule 11 are clear and direct, and if Bungie believes it has legitimate grounds
23 for seeking Rule 11 sanctions, it could have and should have followed the clear procedure set
24 out under Fed.R.Civ.P. 11(c)(1)(A). It has not, choosing instead to talk around the issue
25 rather than confront it head on.

26 In similar manner, Bungie pretends that it is somehow outrageous that the
27 Counterclaims were filed on September 16, 2022 “*over 18 months after Bungie initiated this*
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1 action,” (Bungie Motion p. 2, emphasis in original), as a simple review of the record will
 2 indicate that in all cases extensions of time were granted to Defendants, either by Bungie
 3 itself or by this Court, and there has been no pattern of repeated disregard for the deadlines in
 4 this case on part of the Defendants. Again, it is likely because Bungie’s case is weak on the
 5 merits that it needs to engage in such ancillary, procedural attacks rather than address the case
 6 on the merits.

7 III CONCLUSION

8 For all the reasons stated herein, Bungie’s motion to dismiss should be denied.
 9 Alternatively, should this Court believe further facts are needed, Defendants should be
 10 accorded a reasonable opportunity to amend their Counterclaims.

11 Dated October 24, 2022.

12 /s/ Philip P. Mann

13 Philip P. Mann, WSBA No: 28860

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